In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 827

CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 828

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed. The Secretary of Agriculture, who participated below, joins in the motion.

245-509—67

STATEMENT

These cases are direct appeals from a judgment of a three-judge district court (J.S. App. 11)[1] dismissing two suits brought to set aside the same order of the Interstate Commerce Commission (J.S. App. 13–27). The Commission's order requires 26 railroads transporting cotton for export from Northern Texas and portions of Oklahoma and Eastern New Mexico to end an unlawful preference of the ports of Galveston and Houston in their rates which prejudices the port of Corpus Christi, Texas. Four of the railroads sought to set aside the Commission order in the district court and now appeal to this Court.

The ports of Corpus Christi, Galveston and Houston compete for the export cotton traffic here involved. Ocean rates for the cotton shipped from the three ports are the same. Rail rates, however, from interior points to these ports are the same only for Houston and Galveston. Higher rail rates are charged for Corpus Christi.

The principal origin area of the cotton shipped through these ports is in Northern Texas. Lubbock is the hub of the area.[2] The shortest rail route from Lubbock to Corpus Christi is 646 miles. Houston is

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[1] "J.S. App." refers to the appendix pages of the jurisdictional statements in both No. 827 and No. 828, which reproduce both the opinion and judgment of the district court and the report and order of the Commission on identical pages.

[2] Of the 1,000,041 bales of cotton produced in the origin area involved in this proceeding in 1962–63, nearly 90 percent was produced in Northern Texas (J.S. App. 16). More than 50 percent of all Texas cotton is "grown in the 10 counties of which Lubbock is the hub" (J.S. App. 17).

the closest of the three ports to Lubbock. Galveston is 45 miles farther than Houston, and Corpus Christi is an additional 67 miles beyond Galveston (J.S. App. 9, 22).

Notwithstanding the difference in distance between Galveston and Houston, the appellant roads charge the same rates to these ports but higher rates to Corpus Christi. They produced no cost or other evidence to explain the identity of rates to Galveston and Houston, despite the difference in distance, and the rate differential to Corpus Christi. The roads which have appealed serve Galveston and Houston but do not serve Corpus Christi directly. They fear that an extension of the Galveston and Houston rates to Corpus Christi will result in a loss of revenue to them because some of their traffic is likely to be diverted to Corpus Christi, and on this traffic they would have to divide their revenues with the lines that serve Corpus Christi directly (J.S. App. 19).

The Commission held that the rates were unduly prejudicial to Corpus Christi and unduly preferential to Houston and Galveston, in violation of Section 3(1) of the Interstate Commerce Act.[1] It found that the

[1] Section 3(1), 49 U.S.C. 3(1), provides:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any

rate disparity appears to have exercised "so drastic an influence" on the traffic to Corpus Christi that this port "cannot expect to attract the rail movements of export cotton from the considered origins with higher rates than Galveston and Houston" (J.A. App. 20, 23). It further found that the transportation conditions to Corpus Christi were substantially similar to those to Galveston and Houston: the general terrain over which the railroads operate to the three ports is the same (J.S. App. 21); there is motor carrier competition on traffic to Corpus Christi as well as to Galveston and Houston (*ibid.*); and, while distance is an important factor, the difference in distance alone was not sufficient to justify a higher rate, especially since the three ports have been equalized on other commodities from substantially the same origins (J.S. App. 23).[4]

The district court sustained the Commission's decision, rejecting appellants' argument that no prejudice to Corpus Christi could be shown because the rates per mile were no higher than to the other ports (J.S. App. 5-6). It held that the Commission might lawfully consider other transportation conditions besides the relative mileage from the origin area (J.S. App. 7). Noting that the difference in distance between Corpus Christi and Galveston is 67 miles and that the

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respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description. * * *"

[4] One Commissioner dissented, stating, without further elaboration, that he believed that the "transportation conditions * * * are [not] substantially similar" (J.S. App. 26).

railroads have already disregarded the 45 miles between Galveston and Houston "so [that] the required equalization here is an additional 22 mile difference on a 646 mile haul," the court ruled that the Commission's conclusion "was well within its 'broad discretion * * * to accommodate the factors of transportation conditions, distance and competition'" (J.S. App. 9–10).

ARGUMENT

These appeals do not warrant plenary consideration. The judgment below is correct and should be affirmed.

1. The essence of appellants' position is that the Commission may not compel them to disregard a difference in distance; therefore, since the distance to Corpus Christi is greater than to Houston and Galveston, they have a right to charge higher rates. However, there is no rule that requires the Commission to consider distance to the exclusion of all other factors. Here, as in *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 588, the Commission properly "did not rely strictly upon distance. Distance was a factor but it was not controlling"—for the following reasons:

a. Appellant lines charge the same rates to Galveston as to Houston although Galveston is farther from the area of origin. The additional distance to Corpus Christi is only slightly greater.[5] This sug-

[5] Corpus Christi is only slightly more circuitous (circuity being the percentage that one distance is greater than another) than Houston-Galveston from the origin territory—less than 25 percent on the average (the total of the percentages in col-

gests that the distance factor is not so substantial in the present case to compel a rate differential.

b. Equivalent differences have been disregarded in recent grain rate cases involving substantially the same points.

The district court's refusal to set aside the Commission's order was thus soundly based on an application of the well settled principle that Congress did

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umn (8) of the table on App. 29 to J.S. No. 827 for all three States divided by the number of representative points listed in column (1)). The weighted average circuity for Corpus Christi as compared to Houston-Galveston (total of the distances in column (2) for all 3 States divided by the total of column (5)) is less than 22 percent.

The Commission was aware that the Docket No. 28300 distances to Corpus Christi from the origin area ranged from 20 percent to 60 percent greater than to Houston-Galveston. But it found persuasive the fact that even though this method of measure resulted in the greatest mileage differences, the same range had been present in recent grain rate cases (see note 6, *supra*) where it had required equalization (J.S. App. 23). As a practical matter, the upper limit of this range (60 percent) referred to the distances from an area surrounding only one point of origin, Fort Worth, Texas.

On two occasions the Commission has found that rates on grain and grain products from Oklahoma, New Mexico, and northern Texas to Corpus Christi for export are unduly prejudicial to that port when higher than corresponding rates to other Texas ports, such as Houston and Galveston. *Nueces County Navi. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co.*, 313 I.C.C. 153 (1961) (involving origins in all three States); *Export Grain from Texas to Texas Points*, 319 I.C.C. 16 (1963) (involving origins in Oklahoma and northern Texas). The Commission stated in the latter proceeding, "The history of the rate adjustment on export shipments of grain and grain products to the Texas ports indicates that substantial differences in distance have long been and are now being disregarded generally on this traffic, especially to the Houston-Galveston-Port Arthur group" (at 28).

"not attempt to define an unlawful discrimination with mathematical precision" (*United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352), but left the determination primarily to the Commission, "based upon an appreciation of all the facts and circumstances affecting the traffic" (*New York* v. *United States*, 331 U.S. 284, 347). Having found that there was a rational basis for the Commission's accommodation of the "factors of transportation conditions, distance and competition" (*Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593), the court properly refused to substitute its judgment for that of the Commission (*United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 536).

2. Appellants urge that while the carriers may voluntarily equalize rates in some circumstances, in spite of distance differences (see *City of Wilmington* v. *Alabama, G.S. Ry. Co.*, 316 I.C.C. 709 (1962)), the Commission is without authority to compel them to do so in the same circumstances (J.S. 827, p. 20; J.S. 828, p. 9, n. 3). Such a distinction was rejected by this Court at least forty years ago in *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 523–525. It may be to the advantage of appellant lines, since they do not serve Corpus Christi directly, to maintain the higher rates to Corpus Christi and thus to prevent a diversion of some of this traffic to lines with which they might have to share the revenues. This factor, however, does not preclude a finding of unjust discrimination. Cf. *id.* at 525.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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